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Attorney for Plaintiffs
Telitha Ball, et. al.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Telitha Ball, et. al.,
Plaintiffs

Action No. 08-02831-MHP

Reply to Opposition to
Motion to remand and
Order for payment of Costs
And attorney fees

City and County of
San Francisco, et al.
Defendants

DATE: Aug 11, 2008
TIME: 2:00p.m.
PLACE: Courtroom 15
Judge:
Hon. Marilyn H. Patel

Defendants concede that the matter should be
remanded and object to costs and attorney fees being
imposed.

Costs and attorney fees should be imposed as
the removal was unreasonable and defendants' refusal
to waive the 30 day time period to file a motion to
remand and at the same time insist on a factually
incorrect stipulation, was unreasonable.

1 Without the waiver, the motion to remand would be
2 waived due to defendants clearly and demonstrably
3 unreasonable position regarding the stipulation.

4 I

5 **Removal Unreasonable**

6
7 The removal was unreasonable as 1) there was no
8 attempt to verify or contact the other defendants,
9 including Earnest Ferrando, to determine whether they
10 had been served, as the law requires all served
11 defendants to join in the complaint; and 2) while Fong
12 was served, she did not join the removal, arguing
13 she was sued in her official capacity, where clearly
14 established law provides she used in her individual
15 capacity. See Romano v. Bible (9th Cir 1999) 169 F3d
16 1182, 1186

17 The defendant City and County of San Francisco,
18 Heather Fong and Earnest Ferrando were served prior to
19 the removal.

20 The removal was by the City and County of San
21 Francisco and Heather Fong in her official capacity.

22 Earnest Ferrando did not join the notice for
23 removal.

24 **Further, Heather Fong, in her individual**
25 **capacity does not join the removal.**

26 The notice of removal does not indicate why all
27 the defendants have not joined the petition.
28

1 Accordingly, the notice of removal was defective
2 and unreasonable.

3 Further, defendants argument that it was
4 reasonable to make no inquires as to whether the
5 defendants were served, is unreasonable.

6 Also, the defendant's refusal to even have the
7 Heather Fong join the notice of removal is also
8 unreasonable, as she was served and she is sued in her
9 individual capacity. While the law provides that if
10 there is any doubt of the capacity in which a person is
11 sued--individual or official capacity-- , the law
12 provides that it is assumed that it is the individual
13 capacity. Romano v. Bible (9th Cir 1999) 169 F3d 1182,
14 1186

15 Also, the defendants could, and should have made
16 inquiries as was to whether the defendants had been
17 served. Rather, defendants took the unreasonable
18 position of viewing the case in the narrowest form.
19 It made no inquiries as to who had been served; and,
20 viewed the service in the narrowly: Arguing, for
21 example, that Fong was served in her official capacity
22 with no legal or factual support therefore.

23 Here, defendants had no objectively reasonable
24 basis for believing that all necessary parties to the
25 removal had joined, clearly contrary to clearly
26 established law.

II

**Failure To Waive the 30 day limit to Remand
Was Unreasonable and the cause of the
Necessity of filing the Motion to Remand**

The unreasonable conduct of the defendants is highlighted by plaintiffs attempt to have the matter remanded to state court, by stipulation.

First, the defendants insist on having information in the stipulation which is not true. Paragraph 3 of the stipulation provides that Fong removed in her "individual capacity" See Exhibit E of the declaration of Kimberly Bliss.

Clearly, Fong did not remove in her individual capacity. Even defendants now concede in their opposition papers that Fong removed "in her official capacity" See page 5 of opposition.

While plaintiffs attempted to have this corrected in an e-mail to defense counsel received on June 27, 2008, defense counsel refused to correct the same in a return e-mail on June 27, 2008. See Exhibit F of the declaration of Kimberly Bliss

Further, since defense counsel was going to be unavailable within the next few days, plaintiffs wanted a commitment from defense counsel that it would waive the 30 day limit on filing a motion to remand, while the stipulation was agreed upon.

Thus, if defendants somehow refused to make the reasonable changes which were recommended, plaintiffs

1 would still be able to file a motion to remand, as it
2 did.

3 Had the waiver been granted, then there would be
4 no need to file a motion, as the stipulation could be
5 finalized when defense counsel returned from her
6 vacation.

7
8 **In defendants' opposition, they offer no**
9 **explanation as they could not waive the 30 day time**
10 **limit to file the motion for remand.** Without it,
11 plaintiffs would be forced to sign a stipulation which
12 was inaccurate or waive the remand motion. Plaintiff
13 was also concerned about future attempts to removal and
14 therefore was concerned about the stated
15 facts in the stipulation.

16 Defendants forced plaintiffs to file the motion
17 for remand by 1) unreasonably removing the matter and
18 then unreasonably agreeing to waive time to remand in
19 order to stipulate that the matter should be remanded.

20 **III**

21 **Conclusion**

22 Based on the above, this court should remand
23 the matter to state court and award plaintiffs'
24 reasonable costs and attorney fees.

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27 DATED:

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Gregory M. Haynes
Attorney for Plaintiffs

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